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4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 KRYSTAL K. HOVATER,)
7 Plaintiff,) No. CV-08-00319-JPH
8 v.) ORDER GRANTING PLAINTIFF'S
9 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
10 of Social Security,) AND REMANDING FOR FURTHER
11 Defendant.) ADMINISTRATIVE PROCEEDINGS
12)
13)

14 BEFORE THE COURT are cross-motions for summary judgment noted
15 for hearing without oral argument on May 29, 2009. (Ct. Rec. 12,
16 15). Attorney Lora Lee Stover represents Plaintiff; Special
17 Assistant United States Attorney David J. Burdett represents the
18 Commissioner of Social Security ("Commissioner"). The parties
19 have consented to proceed before a magistrate judge. (Ct. Rec. 6.)
20 After reviewing the administrative record and the briefs filed by
21 the parties, the court **GRANTS** Plaintiff's Motion for Summary
22 Judgment (Ct. Rec. 12) and remands for further administrative
23 proceedings. Defendant's Motion for Summary Judgment (Ct. Rec.
24 15) is **DENIED**.

25 **JURISDICTION**

26 Plaintiff protectively filed applications for disability
27 insurance benefits (DIB) and for supplemental security income
28

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1 (SSI) benefits on April 29, 2005. Plaintiff has alleged suffering
2 from fibromyalgia, Raynaud's syndrome, chronic fatigue, PTSD,
3 depression, and anxiety. (Tr. 51-52, 55, 79-83, 115-116, 126,
4 130.) Both applications allege onset as of February 14, 2001.
5 (Tr. 79-83.) The applications were denied initially and on
6 reconsideration. (Tr. 51-52, 55-58.)

7 At a hearing before Administrative Law Judge (ALJ) Richard A.
8 Say on June 5, 2007, plaintiff, represented by counsel, vocation
9 expert Sharon Welter, and psychologist W. Scott Mabee, Ph.D.,
10 testified. (Tr. 523-552.) On July 26, 2007, the ALJ issued an
11 unfavorable decision. (Tr. 27-40.) The Appeals Council denied
12 review on September 9, 2008. (Tr. 7-9.) Therefore, the ALJ's
13 decision became the final decision of the Commissioner, which is
14 appealable to the district court pursuant to 42 U.S.C. § 405(g).
15 Plaintiff filed this action for judicial review pursuant to 42
16 U.S.C. § 405(g) on October 15, 2008. (Ct. Rec. 1, 4.)

17 **STATEMENT OF FACTS**

18 The facts have been presented in the administrative hearing
19 transcripts, the ALJ's decision, the briefs of both Plaintiff and
20 the Commissioner, and are summarized here.

21 Plaintiff was 29 years old at the time of the hearing. (Tr.
22 531.) She lives alone with her daughter, age eight, and her son,
23 who is four months old. (Tr. 532.) She has a high school
24 education and became a certified nurse's assistant in 2001. (Tr.
25 121-122.) Plaintiff has past relevant work as a telephone
26 solicitor, fast food worker, housekeeper, day care worker, and
27 cashier. (Tr. 117, 533.) Plaintiff lost her job as of February
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1 14, 2001. She was seeing to her primary care physician repeatedly
2 due to an inability to move her arms. (Tr. 532-533.) Plaintiff
3 testified that fibromyalgia prevents her from working. (Tr. 533.)
4 She "catches pretty much anything that's out there" if she goes
5 out in public. Chronic pain prevents walking sometimes, and her
6 anxiety at times is as bad as the pain. (Tr. 533-534.) Plaintiff
7 and her daughter cook and do laundry. Plaintiff drives, shops,
8 cares for her infant son, cleans with rest breaks, and reads. (Tr.
9 534-535.) She drinks once every two weeks and smokes marijuana
10 once or twice a week. (Tr. 537.) Plaintiff can sit for 45
11 minutes, stand for 30 minutes before needing to change position,
12 and walk for 15 to 20 minutes. (Tr. 536.) Her hands shake and
13 she has problems grasping. (Tr. 537.) Plaintiff sees a
14 psychiatrist once every two or three months. (Tr. 538.) She has
15 a migraine headache once a week lasting two days. (Tr. 540.)
16 Medication side effects include nausea and drowsiness. (Tr. 539-
17 540.)

18 SEQUENTIAL EVALUATION PROCESS

19 The Social Security Act (the "Act") defines "disability"
20 as the "inability to engage in any substantial gainful activity by
21 reason of any medically determinable physical or mental impairment
22 which can be expected to result in death or which has lasted or
23 can be expected to last for a continuous period of not less than
24 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
25 Act also provides that a Plaintiff shall be determined to be under
26 a disability only if any impairments are of such severity that a
27 plaintiff is not only unable to do previous work but cannot,
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1 considering plaintiff's age, education and work experiences,
2 engage in any other substantial gainful work which exists in the
3 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
4 Thus, the definition of disability consists of both medical and
5 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
6 (9th Cir. 2001).

7 The Commissioner has established a five-step sequential
8 evaluation process for determining whether a person is disabled.
9 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
10 is engaged in substantial gainful activities. If so, benefits are
11 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If
12 not, the decision maker proceeds to step two, which determines
13 whether plaintiff has a medically severe impairment or combination
14 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
15 416.920(a)(4)(ii).

16 If plaintiff does not have a severe impairment or combination
17 of impairments, the disability claim is denied. If the impairment
18 is severe, the evaluation proceeds to the third step, which
19 compares plaintiff's impairment with a number of listed
20 impairments acknowledged by the Commissioner to be so severe as to
21 preclude substantial gainful activity. 20 C.F.R. §§
22 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
23 App. 1. If the impairment meets or equals one of the listed
24 impairments, plaintiff is conclusively presumed to be disabled.
25 If the impairment is not one conclusively presumed to be
26 disabling, the evaluation proceeds to the fourth step, which
27 determines whether the impairment prevents plaintiff from
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1 performing work which was performed in the past. If a plaintiff
2 is able to perform previous work, that Plaintiff is deemed not
3 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
4 At this step, plaintiff's residual functional capacity ("RFC")
5 assessment is considered. If plaintiff cannot perform this work,
6 the fifth and final step in the process determines whether
7 plaintiff is able to perform other work in the national economy in
8 view of plaintiff's residual functional capacity, age, education
9 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
10 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

11 The initial burden of proof rests upon plaintiff to establish
12 a *prima facie* case of entitlement to disability benefits.
13 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
14 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
15 met once plaintiff establishes that a physical or mental
16 impairment prevents the performance of previous work. The burden
17 then shifts, at step five, to the Commissioner to show that (1)
18 plaintiff can perform other substantial gainful activity and (2) a
19 "significant number of jobs exist in the national economy" which
20 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
21 Cir. 1984).

22 STANDARD OF REVIEW

23 Congress has provided a limited scope of judicial review of a
24 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
25 the Commissioner's decision, made through an ALJ, when the
26 determination is not based on legal error and is supported by
27 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995

1 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
2 1999). "The [Commissioner's] determination that a plaintiff is
3 not disabled will be upheld if the findings of fact are supported
4 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
5 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence
6 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
7 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
8 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
9 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
10 573, 576 (9th Cir. 1988). Substantial evidence "means such
11 evidence as a reasonable mind might accept as adequate to support
12 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
13 (citations omitted). "[S]uch inferences and conclusions as the
14 [Commissioner] may reasonably draw from the evidence" will also be
15 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
16 On review, the Court considers the record as a whole, not just the
17 evidence supporting the decision of the Commissioner. *Weetman v.*
18 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
19 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

20 It is the role of the trier of fact, not this Court, to
21 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
22 evidence supports more than one rational interpretation, the Court
23 may not substitute its judgment for that of the Commissioner.
24 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
25 (9th Cir. 1984). Nevertheless, a decision supported by
26 substantial evidence will still be set aside if the proper legal
27 standards were not applied in weighing the evidence and making the
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1 decision. *Browner v. Secretary of Health and Human Services*, 839
2 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
3 evidence to support the administrative findings, or if there is
4 conflicting evidence that will support a finding of either
5 disability or nondisability, the finding of the Commissioner is
6 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
7 1987).

8 **ALJ'S FINDINGS**

9 At the outset, the ALJ found plaintiff met the DIB
10 requirements through December 31, 2006. (Tr. 29.) [The ALJ noted
11 plaintiff previously applied for benefits and was denied in 2002.
12 He declined reopening the previous denial determination. Tr. 27.]
13 The ALJ found at step one that, although she has worked
14 sporadically since onset, plaintiff has not engaged in substantial
15 gainful activity. (Tr. 29-30.) At steps two and three, the ALJ
16 found that plaintiff suffers from depression, anxiety, migraine
17 headaches, and chronic pain, impairments that are severe but which
18 do not alone or in combination meet or medically equal a Listing
19 impairment. (Tr. 30, 36.) The ALJ found plaintiff less than
20 completely credible. (Tr. 38.) Prior to step four, the ALJ found
21 plaintiff's RFC enables her to perform a range of light work. (Tr.
22 37.) Relying on the VE, the ALJ found that a person with this RFC
23 could perform plaintiff's past relevant work as a telephone
24 solicitor, fast food worker, housekeeper/cleaner, nursery school
25 attendant/daycare worker, and cashier. (Tr. 39-40.) Because the
26 ALJ's step four finding that plaintiff could perform her past
27 relevant work was determinative, the ALJ was not required to
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1 proceed to step five. The ALJ found plaintiff is not disabled as
2 defined by the Social Security Act. (Tr. 40.)

3 ISSUES

4 Plaintiff contends that the Commissioner erred as a matter of
5 law by failing to (1) properly weigh the medical evidence,
6 specifically the opinions of treating Drs. Jon Stevenson, M.D.
7 (rheumatologist), and Paul Srei, M.D.,; (2) include fibromyalgia
8 as a severe impairment; (3) properly assess plaintiff's
9 credibility, and (4) adopt or reject the moderate limitation with
10 respect to pace assessed by Dr. Mabee. (Ct. Rec. 13 at 10-15.)
11 The Commissioner responds that the ALJ appropriately weighed the
12 evidence and asks the Court to affirm his decision. (Ct. Rec. 16
13 at 12). The last issue is dispositive.

14 DISCUSSION

15 A. Weighing medical evidence

16 In social security proceedings, the claimant must prove the
17 existence of a physical or mental impairment by providing medical
18 evidence consisting of signs, symptoms, and laboratory findings;
19 the claimant's own statement of symptoms alone will not suffice.
20 20 C.F.R. § 416.908. The effects of all symptoms must be
21 evaluated on the basis of a medically determinable impairment
22 which can be shown to be the cause of the symptoms. 20 C.F.R. §
23 416.929. Once medical evidence of an underlying impairment has
24 been shown, medical findings are not required to support the
25 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d
26 341, 345 (9th Cr. 1991).

27 A treating physician's opinion is given special weight
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1 because of familiarity with the claimant and the claimant's
2 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9th
3 Cir. 1989). However, the treating physician's opinion is not
4 "necessarily conclusive as to either a physical condition or the
5 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
6 751 (9th Cir. 1989) (citations omitted). More weight is given to
7 a treating physician than an examining physician. *Lester v.*
8 *Cater*, 81 F.3d 821, 830 (9th Cir. 1996). Correspondingly, more
9 weight is given to the opinions of treating and examining
10 physicians than to nonexamining physicians. *Benecke v. Barnhart*,
11 379 F. 3d 587, 592 (9th Cir. 2004). If the treating or examining
12 physician's opinions are not contradicted, they can be rejected
13 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.
14 If contradicted, the ALJ may reject an opinion if he states
15 specific, legitimate reasons that are supported by substantial
16 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44
17 F. 3d 1435, 1463 (9th Cir. 1995).

18 In addition to the testimony of a nonexamining medical
19 advisor, the ALJ must have other evidence to support a decision to
20 reject the opinion of a treating physician, such as laboratory
21 test results, contrary reports from examining physicians, and
22 testimony from the claimant that was inconsistent with the
23 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
24 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
25 Cir. 1995).

26 Plaintiff contends that the ALJ failed to properly credit Dr.
27 Mabee's assessed moderate limitation with respect to pace. The
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1 Commissioner does not respond to this argument.

2 The ALJ's RFC in his written decision and in his verbal
3 hypothetical to the VE do not include the moderate limitation with
4 respect to pace. The ALJ does not discuss why this limitation is
5 adopted or rejected. It is significant in this case, because as
6 plaintiff points out, the VE testified that no work is available
7 to a person with a moderate pace limitation. (Tr. 548-549.)

8 To the extent the ALJ rejects the contradicted opinions of
9 some of the professionals, the reasons must be legitimate,
10 specific, and supported by substantial evidence in the record.
11 See *Lester v. Chater*, 81 F. 3d 821, 830-831 (9th Cir.
12 1995)(holding that the ALJ must make findings setting forth
13 specific, legitimate reasons for rejecting the treating
14 physician's contradicted opinion).

15 The ALJ discusses the opinion of examining psychologist James
16 Bailey, Ph.D., and arguably this opinion is the reason the ALJ
17 failed to specifically adopt or reject Dr. Mabee's assessed
18 moderate limitation, but the record is unclear. As noted, this is
19 a limitation which, according to the VE, if adopted precludes all
20 competitive employment. The ALJ's failure to provide any reason
21 for failing to adopt or reject this limitation is not harmless
22 error. The Commissioner does not address the argument. A remand
23 for further administrative proceedings is required.

24 On remand, the following should be determined: whether
25 fibromyalgia is a severe impairment; a new RFC; an examination of
26 plaintiff's DAA and its effects, if any, on her diagnoses; and new
27 determinations at steps four and five if necessary.

28 The court expresses no opinion as to what the ultimate
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1 outcome on remand will or should be. The fact-finder is free to
2 give whatever weight to the evidence is deemed appropriate. See
3 *Sample v. Schweiker*, 694 F. 2d 636, 642 (9th Cir. 1282)
4 ("Questions of credibility and resolution of conflicts in the
5 testimony are functions solely of the Secretary.")

6 **CONCLUSION**

7 Having reviewed the record and the ALJ's conclusions, this
8 court finds that the ALJ's decision is not free of legal error and
9 supported by substantial evidence..

10 Accordingly,

11 **IT IS ORDERED:**

12 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**) is
13 **GRANTED**. The matter is remanded to the Commissioner of Social
14 Security for further proceedings consistent with this decision and
15 sentence four of 42 U.S.C. § 405(g).

16 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is
17 **DENIED**.

18 The District Court Executive is directed to file this Order,
19 provide copies to counsel for Plaintiff and Defendant, enter
20 judgment in favor of Plaintiff, and **CLOSE** this file.

21 DATED this 1st day of June, 2009.

22 s/ James P. Hutton
23 JAMES P. HUTTON
24 UNITED STATES MAGISTRATE JUDGE
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